No. 14908

United States
Court of Appeals
for the Ninth Circuit

PANCHO BARNES, Also Known as FLORENCE LOWE BARNES,

Appellant,

vs.

UNITED STATES OF AMERICA,

Appellee.

Transcript of Record

Appeal from the United States District Court for the Southern District of California, Northern Division.

FILED

APR 20 1956

PAUL P. O'BRIEN, CLERK

Phillips & Van Orden Co., 870 Brannan Street, San Francisco, Calif.—4-6-56

No. 14908

United States
Court of Appeals
for the Ninth Circuit

PANCHO BARNES, Also Known as FLORENCE LOWE BARNES,

Appellant,

vs.

UNITED STATES OF AMERICA,

Appellee.

Transcript of Record

Appeal from the United States District Court for the Southern District of California, Northern Division.

Phillips & Van Orden Co., 870 Brannan Street, San Francisco, Calif.—4-6-56

INDEX

[Clerk's Note: When deemed likely to be of an important nature, errors or doubtful matters appearing in the original certified record are printed literally in italic; and, likewise, cancelled matter appearing in the original certified record is printed and cancelled herein accordingly. When possible, an omission from the text is indicated by printing in italic the two words between which the omission seems to occur.]

NAMES AND ADDRESSES OF ATTORNEYS

For Appellant:

PANCHO BARNES,
aka FLORENCE LOWE BARNES,
P. O. Box 37,
Muroc, California.

For Appellee:

LAUGHLIN E. WATERS,
U. S. Attorney,
600 Federal Building,
Los Angeles 12, California.

PERRY W. MORTON,
Asst. U. S. Attorney;

ROGER P. MARQUIS,
JOHN C. HARRINGTON,
Attorneys,
Dept. of Justice,
Washington 25, D. C.

In the District Court of the United States, Southern District of California, Northern Division

No. 1221 ND

(MISS) PANCHO BARNES, a/k/a FLORENCE LOWE BARNES,

Plaintiff,

vs.

UNITED STATES OF AMERICA,

Defendant.

AMENDED COMPLAINT FOR DAMAGES

Plaintiff alleges:

I.

This action arises under Title 28, United States Code, section 1346 (b), as hereinafter more fully appears.

II.

Plaintiff resides in the County of Kern, state of California, in the Southern District of California, Northern Division.

III.

The tort claim for which plaintiff sues arises from acts which occurred at Kern County, state of California, in the Southern District of California, Northern Division.

IV.

On December 7, 1941, the plaintiff's airport was closed [2*] by order of the United States Govern-

*Page numbering appearing at foot of page of original Certified Transcript of Record.

ment. Said airport was used by the Government. After the other airports were opened in 1943, plaintiff's airport was kept closed. After the West Coast Defense Command approved the opening of plaintiff's airport, an order came through from Washington to keep plaintiff's field closed. Plaintiff succeeded through drastic action in the opening of her airport in October, 1945. However the Air Corps and later the Air Force used every means to hamper the plaintiff's business and have succeeded in keeping her business from attaining a fraction of its natural growth and used drastic and illegal means so to do. Continuously without cessation the Air Force and/or their agents have harassed the plaintiff and have tried and have ultimately succeeded in gaining illegal control of her property and have violated her Constitutional rights under the V Amendment. There has been a continuous tort committed against the plaintiff resulting in a partial taking or inverse condemnation of plaintiff's property and damage to her business. This complaint is not to be confused with the actual and illegal condemnation suit filed by the government but is for damages in addition to any damages arising from said condemnation suit and the price of the property involved should the plaintiff consent to eventually settle amicably with the United States Government on the condemnation suit and damages accrued therefrom.

V.

At all times mentioned herein plaintiff was the owner and operator of the Rancho Oro Verde in

Kern County, California, consisting of a guest ranch, hotel, restaurant, bar, dance hall, rodeo grounds, swimming pool, race track, hog, cattle and horse business and airport business.

VI.

As the proximate result of the said continuous tort and inverse condemnation the plaintiff has been damaged in the amount of [3] One Million Five Hundred Thousand ($1,500,000.00) Dollars.

Wherefore, plaintiff prays judgment against defendant for One Million Five Hundred Thousand ($1,500,000.00) Dollars, for costs of suit, and for such other and further relief as to the court may seem proper.

/s/ PANCHO BARNES,
Plaintiff In Pro. Per.

Affidavit of Service by Mail attached.

[Endorsed]: Filed Feb. 28, 1955. [4]

[Title of District Court and Cause.]

NOTICE OF MOTION TO DISMISS AND MOTION TO DISMISS

Notice of Motion to Dismiss

Please Take Notice that on the 4th day of April, 1955, at 10 o'clock a.m., or as soon thereafter as counsel may be heard, the undersigned will move

this Court, in the United States Courtroom, United States Post Office and Courthouse, Fresno, California, for an order to dismiss this action.

Dated this 14th day of March, 1955.

LAUGHLIN E. WATERS,
United States Attorney;

MAX F. DEUTZ,
Assistant U. S. Attorney,
Chief of Civil Division;

MARVIN ZINMAN,
Assistant U. S. Attorney;

/s/ MARVIN ZINMAN,
Assistant U. S. Attorney,
Attorneys for Defendant.

Motion to Dismiss

The defendant moves the Court as follows:

(1) To dismiss the Amended Complaint on the ground that this Court is without jurisdiction over the person of the defendant.

(2) To dismiss the Amended Complaint on the ground that this Court is without jurisdiction over the causes of action alleged in said Amended Complaint.

(3) To dismiss the Amended Complaint on the ground that it fails to state a claim against the [8] defendant upon which relief may be granted.

Dated this 14th day of March, 1955.

LAUGHLIN E. WATERS,
United States Attorney;

MAX F. DEUTZ,
Assistant U. S. Attorney,
Chief of Civil Division;

MARVIN ZINMAN,
Assistant U. S. Attorney;

/s/ MARVIN ZINMAN,
Assistant U. S. Attorney,
Attorneys for Defendant.

Affidavit of Service by Mail attached.

[Endorsed]: Filed March 15, 1955. [9]

United States District Court, Southern District of California, Northern Division

No. 1221 ND

(MISS) PANCHO BARNES, aka FLORENCE LOWE BARNES,

Plaintiff,

vs.

UNITED STATES OF AMERICA,

Defendant.

ORDER RESETTING MOTION

Good cause appearing, It Is Hereby Ordered that The motion of the defendant filed on March 15,

1955, to dismiss the Complaint in the above-entitled action heretofore noticed by the moving party for hearing for the 4th day of April, 1955, at 10 o'clock a.m. be, and the same is hereby reset for hearing by the above-entitled court for the hour of 10 o'clock a.m. Friday, April 1, 1955, at the courtroom of the United States District Court of the Northern Division, Southern District of California at Fresno, California.

Dated: March 23, 1955.

/s/ LEON R. YANKWICH,
Chief U. S. District Judge.

Copies received.

[Endorsed]: Filed March 23, 1955. [13]

[Title of District Court and Cause.]

AFFIDAVIT OF BIAS AND PREJUDICE DISQUALIFYING JUDGE

United States of America,
County of Los Angeles,
State of California—ss.

Pancho Barnes, being duly sworn, deposes and says:

1. I am the plaintiff in the above-entitled cause.

2. I did not file this or any affidavit of prejudice ten days prior to the opening of this term at which the defendant's motion to dismiss is to be heard for the reason that the first knowledge I had that the

Honorable Leon R. Yankwich would hear the matter in Fresno on April 1, 1955, was on March 29, 1955.

3. That the Honorable Leon R. Yankwich, before whom this motion to dismiss is to be heard, has a personal bias and prejudice against me, and that the facts and reasons for such belief are as follows:

Chief Judge Yankwich first showed bias and prejudice by going all the way to Fresno and placing himself on a case that was [14] in the process of being heard by the Honorable Campbell Beaumont. That Judge Yankwich made numerous remarks in that case in which affiant was a defendant, which were intended to and/or did intimidate and influence Judge Beaumont against this affiant. That Judge Yankwich showed prejudice in the same case by paying attention to citations made by the United States Attorney but when the affiant attempted to cite a case very much in point he said "I am not interested in what the Judge there did. I am interested in this particular case." Judge Yankwich showed prejudice by not allowing this affiant to finish her argument before him. At the time, affiant remarked that she thought that Judge Yankwich had already made up his mind, probably before the case started, to issue an injunction against her. He refused to let her make any further argument and threatened to send her to jail for contempt of court. This affiant feels that Judge Yankwich was influenced against her and is prejudiced against her. Judge Yankwich has shown further prejudice by

refusing to see this affiant at any time in his chambers on routine ex parte matters. That he further refused to see her in his chambers even in conference with Assistant United States Attorney Max F. Deutz, who is opposing counsel in the above-entitled matter, and who also desired a conference. That Judge Yankwich talked with Attorney Deutz while he was with this affiant on the telephone but refused to talk with affiant. This affiant is informed and believes and therefore alleges that Judge Yankwich would be knowingly and with further prejudice placing this affiant in jeopardy by insisting on hearing any case of hers as he threatened her with jail for contempt when she did not in fact or in any way show or intend any contempt. Judge Yankwich's subsequent actions and attitude has done nothing to reassure the affiant and said affiant believes that Judge Yankwich is so prejudiced against her that any decision that he might make would be biased. The Honorable Peirson M. Hall has already heard portions of this case. Before Judge Yankwich usurps jurisdiction [15] in this case as he did in the other for the sole purpose of wreaking his bias and prejudice on this affiant, affiant would stipulate to have the cause heard in Los Angeles for the convenience of the Judge who already has jurisdiction of the matter.

Dated: March 29, 1955.

/s/ PANCHO BARNES,
Plaintiff.

Subscribed and sworn to before me this 29th day of March, 1955.

[Seal] /s/ JOAN H. MARTIN,
Notary Public in and for the County of Los Angeles, State of California.

Certificate Supporting Affidavit

I herby certify that I am appearing in propria persona in the above-entitled cause, and that the above affidavit is made in good faith.

/s/ PANCHO BARNES,
Plaintiff in Pro. Per.

Copy received.

[Endorsed]: Filed March 30, 1955. [16]

[Title of District Court and Cause.]

ORDER RE: DISQUALIFICATION OF JUDGE

An Affidavit of Bias and Prejudice Disqualifying Judge having been filed by the plaintiff, Pancho Barnes, in the above-entitled matter on March 30, 1955, and the plaintiff, Pancho Barnes, appearing in propria persona, having made an oral motion in Open Court on April 1, 1955, asking the disqualification of Leon R. Yankwich, United States District Judge, on the grounds of bias and prejudice, and the Court having examined the Affidavit and hav-

ing heard the argument of plaintiff, Pancho Barnes, and being fully satisfied in the premises,

Now Therefore, It Is Hereby Ordered that the motion of the plaintiff, Pancho Barnes, for the disqualification of Leon R. Yankwich, United States District Judge, to hear the above-entitled matter should be, and hereby is, denied, and the Affidavit is [18] ordered stricken as legally insufficient and scandalous.

Dated: This 7th day of April, 1955.

/s/ LEON R. YANKWICH,
United States District Judge.

[Endorsed]: Filed April 8, 1955. [19]

United States District Court, Southern District Of California, Northern Division

Civil 1221 ND

(MISS) PANCHO BARNES, aka FLORENCE LOWE BARNES, et al.,

Plaintiff,

vs.

UNITED STATES OF AMERICA,

Defendant.

JUDGMENT OF DISMISSAL

The above-entitled matter having come on for hearing at Fresno, California, on April 1, 1955, on a Motion to Dismiss plaintiff's First Amended Com-

plaint brought by the defendant, United States of America, the plaintiff, Pancho Barnes, appearing in propria persona, and the defendant United States of America, being represented by Laughlin E. Waters, United States Attorney and Max F. Deutz, Assistant United States Attorney, and the Court having received arguments both written and oral, and it appearing to the Court that the complaint on file herein fails to state a claim against the defendant on which relief can be granted, and the Court being fully satisfied in the premises,

Now Therefore It Is Hereby Ordered, Adjudged and Decreed that the above-entitled action shall be, and hereby is, dismissed.

Dated: This 12th day of April, 1955.

/s/ LEON R. YANKWICH,
United States District Judge.

Affidavit of Service by Mail attached.

[Endorsed]: Filed, docketed and entered April 12, 1955. [20]

[Title of District Court and Cause.]

NOTICE OF APPEAL TO COURT OF APPEALS FOR THE NINTH CIRCUIT UNDER RULE 73(b) AND TITLE 28 U.S.C.A. (REVISED) SECTION 1292

Notice is hereby given that Pancho Barnes (also known as Florence Lowe Barnes), plaintiff above

named, hereby appeal to the United States Court of Appeals for the Ninth Circuit from the judgment of dismissal dated and entered April 12, 1955, of the above-entitled action.

1. On the grounds that the plaintiff did sue on a continuous tort which tort did start in 1941 and was still in continuance up and until February 27, 1953, which was the date on which a condemnation suit was filed by the government. The subject suit was filed some ten months previously in 1952. The Honorable Judge Yankwich stated that "the acquisition of the property through condemnation by the government put an end to the action." The subject action has nothing to do with the later filing by the government of a condemnation suit, nor did the government have the power to terminate an action merely by the filing of another action.

2. The Honorable Leon R. Yankwich has on two occasions appeared on the bench in plaintiff's cases. In one instance on a case which [22] was then in trial before another judge who was not engaged that day and could have heard said hearing and in the instant case in which the case had been set before Judge Tolin and the Honorable Judge Yankwich did set the case ahead of the regular hearing date and hear it himself.

The plaintiff did make an affidavit of prejudice which was true and according to prescribed law and did recite in brief the exerpts from many paragraphs of the transcript. The Honorable Judge

Yankwich did say "The only truthful thing in your affidavit is that I refused to see you." The plaintiff feels that in this statement the Honorable Judge Yankwich did accuse the plaintiff of the violation of her oath and in short accused her of perjury and only further did make a display of his unmitigated prejudice toward the plaintiff.

/s/ PANCHO BARNES,
Appellant in Propria Persona.

Copy received.

[Endorsed]: Filed (with receipt of Service by Defendant) June 9, 1955. [23]

[Title of District Court and Cause.]

UNDERTAKING FOR COSTS ON APPEAL

Whereas, Pancho Barnes, plaintiff in the above-entitled action is about to appeal to the Circuit Court of Appeals for the Ninth Circuit from judgment entered in said action on April 12, 1955, in the District Court of the United States, for the Southern District of California, Northern Division.

Now Therefore, in consideration of the premises and of such appeal the undersigned, National Automobile and Casualty Insurance Company, a corporation organized and existing under and by virtue of the laws of the State of California, as Surety, does hereby undertake and promise on the part of the Appellant that said Appellant will pay all costs if the appeal is dismissed or the judgment affirmed,

or such costs as the Appellate Court may award if the judgment is modified, not exceeding Two Hundred Fifty and No/100 ($250.00) Dollars, to which amount it acknowledges itself bound.

In Witness Whereof, the said National Automobile and Casualty Insurance Company has caused this obligation to be signed by its duly authorized Attorney-in-Fact at Los Angeles, California, and its corporate seal to be hereto affixed, this 20th day of June, 1955.

NATIONAL AUTOMOBILE AND CASUALTY INSURANCE COMPANY,

By /s/ WILLIAM E. FORTNEY,
Attorney-in-Fact.

I hereby approve the foregoing bond.

Dated the 21st day of June, 1955.

/s/ LEON R. YANKWICH,
Judge.

Examined and Recommended for Approval as provided in Rule 13.

/s/ PANCHO BARNES,
In Pro. Per. [26]

State of California,
County of Los Angeles—ss.

In this 20th day of June, in the year 1955, before me, Loraine G. Winston, a Notary Public in and

for said County and State, personally appeared William E. Fortney known to me to be the person whose name is subscribed to the within instrument as the Attorney-in-Fact of the National Automobile and Casualty Insurance Co., and acknowledged to me that he subscribed the name of the National Automobile and Casualty Insurance Co., thereto as surety, and his own name as Attorney-in-Fact.

/s/ LORAINE G. WINSTON,
Notary Public in and for Said
County and State.

My commission expires July 21, 1956.

[Endorsed]: Filed June 21, 1955. [25]

[Title of District Court and Cause.]

DESIGNATION OF THE RECORD ON APPEAL UNDER RULE 75(a) R. C. P.

Comes now the appellant and pursuant to Rule 75(a) R.C.P., designates the following as the contents of the record on appeal:

1. Amended complaint for damages;
2. Notice of motion to dismiss amended complaint;
3. Motion to dismiss amended complaint;
4. Order resetting motion from April 4, 1955, to April 1, 1955;
5. Affidavit of bias and prejudice disqualifying judge;

6. Order re: Disqualification of judge;

7. Judgment of dismissal;

8. Reporter's transcript of proceedings, April 1, 1955, pages 1 through 24. Honorable Leon R. Yankwich, Judge presiding: [27]

9. Notice of appeal to the Court of Appeals for the Ninth Circuit under Rule 73(b) and Title 28, U.S.C.A. (Revised) Section 1292;

10. Undertaking for costs on appeal;

11. This designation.

Dated: July 15, 1955.

/s/ PANCHO BARNES,
Pancho Barnes, Appellant
in Propria Persona.

[Endorsed]: Filed July 15, 1955. [28]

[Title of District Court and Cause.]

STIPULATION TO EXTEND TIME TO DOCKET RECORD ON APPEAL, AND ORDER THEREON

It Is Hereby Stipulated by and between the plaintiff-appellant, Pancho Barnes, also known as Florence Lowe Barnes, in propria persona, and the defendant-appellee, United States of America, by its attorneys Laughlin E. Waters, United States Attorney, and Richard A. Lavine, Assistant U. S. Attorney, that the clerk of the United States District Court may have to and including ninety (90)

days from the time of filing notice of appeal in the above-entitled action, namely, June 9, 1955, in which to docket said appeal with the Court of Appeals, Ninth Circuit.

Dated: July 15, 1955.

/s/ PANCHO BARNES,
Plaintiff-Appellant.

LAUGHLIN E. WATERS,
United States Attorney;

RICHARD A. LAVINE,
Assistant U. S. Attorney;

By /s/ RICHARD A. LAVINE,
Attorneys for Defendant-Appellee, United States of America.

It Is So Ordered. This 15th day of July, 1955.

/s/ LEON R. YANKWICH,
United States District Judge.

[Endorsed]: Filed July 15, 1955. [30]

[Title of District Court and Cause.]

CERTIFICATE OF CLERK

I, John A. Childress, Clerk of the United States District Court for the Southern District of California, do hereby certify that the foregoing pages numbered 1 to 30, inclusive, contain the original

Amended Complaint for Damages;
Motion & Notice of Motion to Dismiss, etc.;
Order Resetting Motion;
Affidavit of Bias and Prejudice Disqualifying Judge;
Order Re: Disqualification of Judge;
Judgment of Dismissal;
Notice of Appeal;
Cost bond on Appeal;
Designation of Record on Appeal;
Stipulation to Extend Time to Docket Record on Appeal

which, together with 1 volume of Reporter's Transcript of Proceedings in the above-entitled cause, constitute the transcript of record on appeal to the United States Court of Appeals for the Ninth Circuit, in said cause.

I further certify that my fees for preparing the foregoing record amount to $2.00, which sum has been paid by appellant.

Witness my hand and the seal of said District Court, this 18th day of October, 1955.

[Seal] JOHN A. CHILDRESS,
Clerk;

By /s/ CHARLES E. JONES,
Deputy.

In the United States District Court, Southern District of California, Northern Division

Nos. 1146-ND and 1221-ND

(MISS) PANCHO BARNES, aka FLORENCE LOWE BARNES,

Plaintiff,

vs.

UNITED STATES OF AMERICA,

Defendant.

Honorable Leon R. Yankwich, Judge Presiding.

REPORTER'S TRANSCRIPT OF PROCEEDINGS

Appearances:

For the Plaintiff:
PANCHO BARNES,
In Pro Per.

For the Defendant:
LAUGHLIN E. WATERS,
United States Attorney, By
MAX F. DEUTZ,
Assistant United States Attorney.

Friday, April 1, 1955, 10:00 A.M.

The Clerk: There are two Barnes matters, and the Burns matter.

The Court: All right, call them in order.

The Clerk: 1146, Pancho Barnes vs. United States.

Miss Barnes: Ready, your Honor. Did you have a chance to read the affidavit of prejudice that I filed?

The Court: Yes, I have read it. I have read the affidavit of prejudice.

Miss Barnes: What do you think about it?

The Court: Well, I am not answering questions. If you have anything to add to it, why, I will let you add to it.

Miss Barnes: May I add to it at this time?

The Court: Not to the affidavit, but any legal reason you can give, I will listen to it.

Miss Barnes: Well, your Honor, you made a great many references at that time and through that case as to me representing myself as an attorney, which is my constitutional right, and I would like to add that to my objections to appearing before you.

The Court: All right.

Mr. Deutz, in the affidavit it is stated that I talked to you but I wouldn't talk to her on the phone. Will you state for the record the one question you asked me and the [2*] answer I gave you, on Friday?

Mr. Deutz: The statement, as I recall, was I asked your Honor over the telephone if Miss Barnes and I could come down to your chambers to discuss the matter with you, and at that time you advised me that you did not wish to discuss the matter, that

*Page numbering appearing at top of page of original Reporter's Transcript of Record.

you felt the proper procedure was to file an affidavit of prejudice in the proper form and you would make your ruling thereon.

The Court: That is right. She was near you, where she could hear what you said?

Mr. Deutz: She was next to me at the telephone at the time I made the call.

The Court: Did I make any other statement in regard to the case, other than the statement if she has any grounds for disqualification to file them in an affidavit?

Mr. Deutz: My recollection is that was all that was said.

The Court: All right.

Miss Barnes: Also, your Honor, at that time Mr. Deutz was sort of reticent to tell you exactly what I had in mind, and I asked him to, and then I said, "Here, let me talk to his Honor."

And Mr. Deutz said, "Well, just a minute, she would like to speak to you," or words to that effect, and I started taking the phone, and I heard you over the phone saying, "Well, I won't talk to her; I won't talk to her." [3]

The Court: That is correct. I do not talk to litigants, and you are a litigant. The only truthful thing in your affidavit is that I refused to see you, because you have sought, every time you filed a paper, an opportunity to present it to me in person, and the word you received was those were to be filed with the clerk, because it is not the custom to talk to litigants, and while you appear in pro per that

doesn't make you a lawyer, and we do not talk to litigants.

Miss Barnes: I disagree with you, your Honor. It doesn't make me a lawyer, except according to myself, but I certainly should receive the same consideration as a lawyer.

The Court: We do not talk to litigants. We talk to lawyers because lawyers know the ethics of the profession, and litigants do not.

All right, anything further you want to say?

Miss Barnes: Well, yes. I would like your Honor to look at an opinion written by Judge Fee, of the Ninth Circuit Court of Appeals. In fact, there are two here. In other words, this one I would like your Honor to look at. (Handing document.)

The Court: Well, I don't think those bear upon the question. I am familiar with this opinion. This merely decides a certain appeal is premature. I don't know that has anything to do with this. [4]

Miss Barnes: It decides much more than that, your Honor.

The Court: Well, I am not interested in that. What I am hearing now, is there anything more you want to say on your motion to disqualify me?

Miss Barnes: This is still on the motion to disqualify you, your Honor. At the end of that motion, that is your own case, the injunction case which I appealed, and it was dismissed as moot. However, if you will read the last paragraph you will see it can be reopened at the proper time.

The Court: Well, all right.

Miss Barnes: But you will find in the original opinion that I showed you that the Appeals Court

did not agree with many comments that you made in the injunction case which really had nothing to do with the injunction, and it happened his Honor, Judge Beaumont, did more or less follow some of the words that you had said in there, which had nothing to do with the injunction but did apply to the court case then in front of him.

The Court: All right. You may be seated. Have you finished?

Miss Barnes: Well——

The Court: I am not going to engage in a dialogue with you. I will listen to you to the extent you want, but you will have to sit down when you are through so I can hear from the other side, and say what I want to say for the record. [5]

Miss Barnes: I feel, your Honor, that you are prejudiced.

The Court: All right.

Miss Barnes: From a sporting standpoint, if I feel that way you shouldn't sit on my case, because I am sort of like a rabbit in a trap and you are the hunter.

The Court: All right.

Mr. Deutz: May I ask that both affidavits be considered in both cases, your Honor, as identical?

The Court: They are the same.

The motion to disqualify will be denied, and the affidavits will be ordered stricken from the file because they are scandalous, not only as to this Court, but as to the memory of the late Judge, because it is alleged that I dominated the late Judge Beaumont. This is a procedure which is permitted,

in fact, it is the procedure which Judge Youngdahl followed recently when the government sought to disqualify him on as flimsy grounds as Miss Barnes is trying to disqualify me.

The trouble with Miss Barnes is that she does not understand the law and every time that—please sit down—every time the judge rules against her she tries to do something about it. She has a right to appeal, of course, but the Congress of the United States provided in Section 144 that whenever a party to an action files a timely affidavit that the judge before whom the matter is pending has a personal [6] bias or prejudice either against him or in favor of an adverse party, said judge shall proceed no further in the matter. The section requires that facts are to be stated. The mere statement that the litigant believes the judge is prejudiced is no sufficient. It says "shall state facts."

As a matter of fact, there is pending before the Congress at the present time a bill that would change this and allow the mere statement to go, but that is not the law at the present time, and the courts of appeal, including our own, have held repeatedly that the mere fact that the judge has ruled against the litigant, and has done it repeatedly, does not constitute bias or prejudice. All that is here alleged is that I ruled against the litigant here in an injunction matter and a claim that I didn't follow the law. Well, of course, there is an appeal from that if I didn't follow the law, why, the court can correct it.

But the Supreme Court of the United States—

this is a shotgun section. It is not like the State courts. In the State courts if an affidavit is filed against the judge, the judge is allowed to file a counter-affidavit. Then he calls in a third judge, another judge, and that judge determines whether on the basis of the affidavits it is disqualification. There is no such thing here.

If the affidavit is legally sufficient, that is, if it states facts that show a bias or prejudice, not ruling against [7] a party, but a personal bias, an enmity towards the litigant, then the judge must immediately disqualify himself, and the courts have held—one of the courts of appeal said, in Tucker vs. Kerner, a case from the Seventh Circuit, that the duty to deny the affidavit on insufficient allegations is not less imperative than to allow it on sufficient allegations.

In other words, a litigant is not permitted, whether it be the government, whether it be a big corporation, as happened to be the case with Metro-Goldwyn-Mayer in the case where they sought to disqualify me and I held I wasn't disqualified and the Court of Appeals agreed with me.

In other words, we do not allow the very thing Miss Barnes thinks they should allow, that because she thinks I am prejudiced I ought to disqualify myself. We do not allow a litigant to choose judges. And bias means a personal hatred, a personal animosity arising not from the litigation but for other reasons, extraneous reasons, and this is what the Supreme Court said in the famous case, interpreting

the section, Ex Parte American Steel Barrel Company and Seaman, a very famous case:

> "The basis of the disqualification is that personal bias or prejudice exists, by reason of which the judge is unable to impartially exercise his functions in the particular case. It is a [8] provision obviously not applicable save in those rare instances in which the affiant is able to state facts which tend to show not merely adverse rulings already made, which may be right or wrong, but facts and reasons which tend to show personal bias or prejudice. It was never intended to enable a discontented litigant to oust the judge because of adverse rulings made, for such rulings are reviewable otherwise, but to prevent his future action in the pending cause. Neither was it intended to paralyze the action of a judge who has heard the case, or a question in it, by the interposition of a motion to disqualify him between a hearing and a determination of the matter heard. This is the plain meaning of the requirement that the affidavit shall be filed not less than ten days before the beginning of the term."

Repeated rulings against the litigant, no matter how erroneous—I am adding this, this is not in the quotation—no matter how erroneous, and how vigorously and how consistently expressed, are not disqualifying.

The Court of Appeals for the Ninth Circuit has ruled consistently to that effect. Some of the lead-

ing cases are Price vs. Johnston, 125 Fed. (2) 806, at 811, 812; Beecher vs. Federal Land Bank of Spokane, Washington, 153 Fed. (2) 987 and 988. [9]

That is a very interesting case because Beecher, like Miss Barnes, is a pro per litigant, and he has been litigating with the Land Bank before Judge Dryer for a long, long period of time, and every so often Beecher files a new affidavit of disqualification, claiming that the judge has ruled so consistently against him that he must be prejudiced, and each time the Court has said that is not the law. I want to read this last case, Beecher case; it is very interesting because Beecher too is appearing for himself.

> "Appellant contends that the district judge became disqualified on November 7, 1943, by the filing of a claimed affidavit of prejudice. The gravamen of the affidavit is the successive rulings of the judge adverse to appellant and his comments on the appellant's method of conducting his case. We do not think they constitute personal prejudice against appellant and affirm the order of the district judge declining to disqualify himself."

The motion to disqualify will be denied, and the affidavit will be ordered stricken from the record as scandalous.

Miss Barnes: May I speak now?

The Court: No.

Miss Barnes: Will you make a written order?

The Court: That order is sufficient. [10]

Miss Barnes: I want to appeal the order.

The Court: That is all right, that order is sufficient.

Miss Barnes: To appeal?

The Court: Yes. The minute order has been entered. We will now proceed to hear the matter on the merits.

Mr. Deutz: There are two cases, 1221 and 1146. We had earlier motions in both these cases.

The Court: Please be seated while other counsel is talking, madam. That is the rule of the Court.

Mr. Deutz: We had earlier motions in both of these cases, and the plaintiff voluntarily amended the complaints——

The Court: I am aware of the facts. I have looked at the file.

Mr. Deutz: Very well, then, I don't know of any further argument——

The Court: And the motion I looked at the other day when I was here, and I looked at it again, and the new motion—wait a minute, I have clipped the last complaint. It is a rather short complaint. What number are we on now, 1221? The complaint is the one filed, new amended complaint, the brief complaint.

Miss Barnes: 1146.

The Court: Filed February 28th. All right.

Mr. Deutz: You are discussing 1221 now. As to both complaints, I think we would be willing to submit the [11] government's motion on the written motion——

The Court: Well, no, don't do that, because I

want to hear your matter, because there are no contrary authorities and I want to hear the others, so you can summarize what you state in your memorandum.

Mr. Deutz: Very well, your Honor.

As to 1221, the objection there is in two parts, although it is in one cause of action. The plaintiff complains there that during the war the government closed down her airport. She maintains a private airport used by private aircraft, or did maintain, on the premises of a ranch adjoining the Edwards Air Force Base, and during the war this airport was closed. Now, since action was recently taken to condemn the land in other proceedings in this court, she is no longer in the possession of that land and has moved elsewhere. However, she is claiming that the Air Force in closing down the airport during the war and subsequently, has carried on certain courses of conduct, not specified, wherein she states they have succeeded in keeping her business from attaining a fraction of its natural growth and have otherwise impaired and violated her right to control of her property.

Now, it is our position that as far as anything that has happened prior to two years from the filing of the original complaint here there could be no cause of action under the Federal Tort Claims Act, because of the two-year [12] statute of limitations. However, she does specify something here which she denominates as a continuous tort committed against her which constitutes a partial taking

or inverse condemnation of the plaintiff's property and damage to her business.

Now, at the time that this complaint was filed she was still in possession of that business, so that if there were in fact a continuing tort there might be some basis for a cause of action there. However, there is no actual continuous tort specified other than an alleged interference with her business.

Now the Federal Tort Claims Act, in Section 2680, specifically provides that there will be no cause of action against the United States for anything constituting interference with contract rights, and that would appear to be the only type of tort that she has specified here, and for that reason we think that the claims under this complaint are barred; the earlier ones barred by the statute of limitations, and the more recent ones, if any, barred by the fact that there is a specific exception to claims involving contract rights.

I think that is the gist of action 1221.

Now, action 1146 is a companion case, and 1146 is set up in two counts, and in the first count, first cause of action, the allegation is that the United States Government, [13] by certain alleged misrepresentations of certain of its officers to the Post Office Department of the United States Government, changed the name of the Muroc post office to Edwards post office, and by reason of that change of name there has been certain damage to the plaintiff by individuals being led to believe that—I will strike that—there has been some confusion in the

mail and resulting loss of business. Now, exactly how that would arise is not specified except that the allegation reads:

> "The change of name from Muroc to Edwards caused confusion in the mail and to the guests and patrons of the plaintiffs' guest ranch, resulting in loss of business. The resulting publicity in the change of name led many patrons of the guest ranch to believe that said ranch had gone out of business."

Well, the change of name was that of the post office. It is our contention that any action taken by the post office to change the name of a post office is strictly a discretionary act and as such would lie within the exceptions of Section 2680(a) of Title 28, United States Code, which provides that a cause of action under the Federal Tort Claims Act will not lie where the acts complained of are the result of discretionary acts on the part of government employees, even though that discretion might be abused, and under those circumstances I feel that the first cause of action is not [14] well taken.

The second cause of action is somewhat different. In that case the plaintiff has alleged a concussion resulting from certain activities of the employees of Edwards Air Force Base, which so cracked and damaged the plaintiffs' swimming pool that repair was inadvisable and it was deemed necessary to build a new pool. In addition, the negligent concussion damaged several ranch and hotel buildings, and the underground irrigation pipes, and so forth.

Now, as to that second cause of action, I must concede that if there is in fact a tort then there would be a cause of action under the tort claims act, provided the action is timely brought, and to that extent it may well be that the motion to dismiss as to that cause of action is not well taken, but in lieu thereof we would request the Court to grant a motion for a more definite statement, specifying the exact occurrences on which the concussion took place, specifying them as to time and as to the number of repetitions.

The Court: She has alleged that within two years.

Mr. Deutz: She alleges within two years——

The Court: That is sufficient for the purpose of the motion to dismiss.

Mr. Deutz: Well, that is possibly true, and we will have to take discovery procedures to establish whether or not they were in fact within two years.

So I am stating to the Court at this time that I feel that she possibly has a valid cause of action at the present posture of the case, but the first cause of action is not valid under any circumstances and should be stricken.

The Court: All right, I will hear you.

Miss Barnes: I am going to take 1146-ND, which is the case he just finished talking about, first, which regards the change of name of the post office.

I know the government has wide discretional power in what they may do. I know that a negli-

gent act or tort claims act is an act in which they are negligent. Now, the Air Force were not negligent in asking the post office to change the name, but they were misinformative to the post office as to the condition, and the post office believed them and changed the name.

That is the first point of that, and as Mr. Deutz says, he rather concedes that the rest of that case is possibly a proper case, your Honor.

Now, going on to the other case, which is 1221-ND?

The Court: That is right, 1221.

Miss Barnes: That is, your Honor, what I believe is known as an inverse condemnation case. In 1941 the government closed all the airports. Now, in a great many cases they did not take them over and use them, they just closed them; but they took my airport over shortly after that and used it throughout the war. I never made any claim on that at all.

I drew up a very full and large and detailed complaint, and the United States Attorney's office criticized that complaint, because they said it was a narrative complaint and there was too much in, and consequently the complaint now, which is an amended complaint, is not detailed, and the reason it is not detailed is because the point is to state merely what the complaint should be, and all of the small intricacies of it should be brought out later at the time of trial.

Nevertheless, starting as of December 7, 1941 when the government by order closed all of the air-

ports, then shortly after took over the use of my airport, they just used it, to which I made no objection at the time. We were in a very crucial state of war at the time and that was no time to object to anything, and consequently they went ahead and used it.

In 1943, I believe, they opened most of the airports. They refused to open my airport. I had to take semi-legal action; in other words, I went before a department composed of the C.A.A., the Navy and the Army. The Air Force rigorously attempted to keep my airport closed after that time. That was 1945, and it was later opened by the vote of the Navy and the C.A.A., the Air Force still resisting the opening of that airport.

Now, they kept the airport closed there two years after it should have been opened, in an arbitrary fashion and for no reason at all. They never offered any compensation, they were using the airport at the time.

From there on down, your Honor, we have a pretty well authenticated case now which has come out of all these various cases and things we have had with the government. We have got the story, and we have found out that the government has coveted and wanted that property, and we have found out it was illegal, their taking of it, which case I am going to prove later, and through the courts I think it will finally come out that the government has had no legal basis for the taking of it,

or any necessity for it, and it has been a great abuse of discretion. That, of course, is on the condemnation suit.

This case here has nothing to do with the condemnation suit. This case is simply that they tried to harrass me off that property in order to take or control it years ahead of when they needed it, or when they may even have had any congressional right to take it, the use of that property dating back to 1941.

That situation has never abated. In other words, it is a question of continuous inverse condemnation, or a continuous taking of that property. Mr. Deutz is speaking of implied contract, it may have been an implied contract legally, but it certainly wasn't intended as such; it was [18] intended simply as the taking of the property.

Now, I think your Honor has felt all through this proceeding, or any contact that he has had with me, that I am a very arbitrary person, a very capricious person, that I am an opinionated person, that I would like to ask a judge to disqualify himself only because he ruled against me. I believe that your Honor has had that impression right straight through. I think your Honor has had the impression that my fighting the condemnation case has been simply an arbitrary act on my part.

The Court: That has already been decided. We are talking now about the sufficiency of the complaint. The other matter has already been disposed of.

Miss Barnes: Yes. But I wish to say there has been a continuous tort, a continuous procedure against me, and as late as this year when I sued the General and had a case against him in Judge Carter's court, the legal officer from A.R.D.C. told me so. He stated that that General was put there with the primary reason of getting rid of me. Now, that has gone on right down to the filing of this complaint, and I think I can prove in court that this is all justified.

The Court: You talk about inverse condemnation. It ultimately has to result in a condemnation where you are allowed to receive the full value of your property, then the only cause of action you have predates that and is long since outlawed.

Miss Barnes: I wouldn't say so, your Honor.

The Court: Because after they took over the property, then they took it over under the rules and then your cause of action from then on—they are the owners of the property.

Miss Barnes: Yes, they are the owners of the property——

The Court: Therefore, you cannot change back a cause of action to the present time——

Miss Barnes: Wait a minute, your Honor. They are the owners of the property when, as and if they get it, but they do not own it at this time, and if you will read the opinion of Judge Fee, they only have a very cloudy defeasible title and they do not own the property even as of now. But that is not what I am talking about here, your Honor.

Condemnation of property is of the value of the

land and the property itself. That is not as of the ruining of your business in the taking of your property. In other words, this would mean that they were taking it twice, once over a period of years in small parts, and eventually altogether at a different price—two entirely different things.

The Court: All right. All right, Mr. Deutz?

Mr. Deutz: I have nothing further, your Honor.

The Court: All right. To go back, as to 1221, the motion to dismiss will be granted.

Miss Barnes: Just one minute, your Honor. I would [20] just like to bring up one point here too, maybe you are not cognizant of. This case that we have now for dismissal was filed before the condemnation suit was filed by more than a year.

The Court: Well, that doesn't change the cause of action. This was filed in '52. The question is not when you filed it. The question is when did your cause of action arise, and you allege here the cause of action arose in '41. That is the point.

Miss Barnes: No, but it is continuous, your Honor.

The Court: Very well. The motion to dismiss will be granted, on the ground it doesn't state a claim against the United States, and assuming it states a claim for some kind of trespass, the acquisition of the property through condemnation by the government put an end to the action, and therefore what followed subsequently was done under the power of condemnation and cannot be cumulative so as to make it a continuous tort.

Motion to dismiss will be granted, in that number.

In number 1146, the motion to dismiss will be granted as to the first cause of action, the post office having the right to change the names of post offices, no person can be charged with tort for advising them or inducing them to secure the change. It is only if they had no right that somebody induced them would be breach of a contract. The motion to dismiss will be granted as to that.

The second cause of action, motion to dismiss will be denied, upon the ground that the allegation of paragraph III shows that the acts were done, alleged acts were done within two years. We have to assume that the allegations are correct for the purpose of the motion, and if later on after discovery procedures it should develop that they are not, that the acts preceded the two-year period, then such question may be raised on a motion for summary judgment or pre-trial of the matter.

Miss Barnes: You have also for consideration these were filed originally in early '52, in that length of time.

The Court: All right, you prepare written orders, Mr. Deutz.

Mr. Deutz: Very well, your Honor, I will.

Miss Barnes: You are going to sign them?

The Court: We will declare a short recess.

(Short recess.)

The Court: All right.

The Clerk: Hughes vs. Rudnick.

Miss Barnes: May I please approach the bench? From the Ninth Circuit Court of Appeals they say that a minute order of the Court is not acceptable, and can you instruct Mr. Deutz to prepare a written order in the matter of the prejudice?

Mr. Deutz: If the Court would like a written order on the denial of the petition for disqualification I will prepare it.

The Court: It doesn't matter. A petition for disqualification is not a final order. You do not need to consider it a final order. If you want to, you can make it. There is no appeal from a motion to disqualify.

Mr. Deutz: Well, Miss Barnes apparently thinks there is, and in that case shall I prepare an order?

The Court: There is no appeal. You can issue a writ and it can be used only in criminal cases. It was used in the Shibley case.

Mr. Deutz: Well, if it would satisfy Miss Barnes would it be all right?

The Court: I have no objection. Just make an order——

Mr. Deutz: I will make a short order.

The Court: Just an order denying it on the insufficiency of the affidavit.

Mr. Deutz: Fine. Thank you, your Honor.

Certificate

I hereby certify that I am a duly appointed, qualified and acting official court reporter of the United States District Court for the Southern District of California.

I further certify that the foregoing is a true and correct transcript of the proceedings had in the above-entitled cause on the date or dates specified therein, and that said transcript is a true and correct transcription of my stenographic notes.

Dated at Fresno, California, this 4th day of April A.D., 1955.

/s/ HELEN G. SCHULKE,
Official Reporter.

[Endorsed]: No. 14908. United States Court of Appeals for the Ninth Circuit. Pancho Barnes, also known as Florence Lowe Barnes, Appellant, vs. United States of America, Appellee. Transcript of Record. Appeal from the United States District Court for the Southern District of California, Northern Division.

Filed October 19, 1955.

/s/ PAUL P. O'BRIEN,
Clerk of the United States Court of Appeals for the Ninth Circuit.

In the United States Court of Appeals
for the Ninth Circuit

No. 14908

PANCHO BARNES, aka FLORENCE LOWE BARNES,

Appellant,

vs.

UNITED STATES OF AMERICA,

Appellee.

DESIGNATION OF RECORD

Appellant, Pancho Barnes, designates the following documents and excerpts from the Reporter's Transcript, to be printed as part of the record:

Eliminate any affidavits of service and insert the words "affidavit of service by mail."

Eliminate title of District Court and cause on each document except on Complaint and Order Resetting Motion.

1. Amended Complaint. Pages 2, 3, 4, 5.
2. Motion to Dismiss. Pages 7, 8, 9, 12.
3. Order Resetting Motion. Page 13.
4. Affidavit of Bias and Prejudice Disqualifying Judge. Pages 14, 15, 16, 17.
5. Order Re: Disqualification of Judge. Pages 18, 19.
6. Judgment of Dismissal. Pages 20, 21.
7. Notice of Appeal. Pages 22, 23, 24.
8. Undertaking for costs on appeal. Pages 25, 26.

9. Designation of Record. Pages 27, 28, 29.

10. Stipulation to extend time to docket record on appeal, and order thereon. Page 30.

11. The following portions of the Reporter's Transcript of Proceedings in the District Court, April 1, 1955:

Page 2—lines 7 through 25, inclusive.
Page 3—lines 1 through 25, inclusive.
Page 4—lines 1 through 25, inclusive.
Page 5—lines 1 through 25, inclusive.
Page 6—lines 1 through 25, inclusive.
Page 7—lines 1 through 16, inclusive.
Page 10—lines 19 through 25, inclusive.
Page 11—lines 1 through 5 inclusive and lines 24 and 25.
Page 12—lines 1 through 25 inclusive.
Page 13—lines 1 through 22, inclusive.
Page 16—lines 19 through 25, inclusive.
Page 17—lines 1 through 25, inclusive.
Page 18—lines 1 through 25, inclusive.
Page 19—lines 1 through 25, inclusive.
Page 20—lines 1 through 25, inclusive.
Page 21—Lines 1 through 19, inclusive.

12. Statement of Points. Pages 1 through 3.

13. Designation of Record. Pages 1 through 3.

Dated this 30th day of November, 1955.

/s/ PANCHO BARNES,
Appellant In Propria Persona.

Affidavit of Service by Mail attached.

[Endorsed]: Filed Dec. 2, 1955.

[Title of Court of Appeals and Cause.]

COUNTER DESIGNATION OF RECORD

The United States of America, appellee, designates for inclusion in the printed record those portions of the Reporter's Transcript of the Proceedings on April 1, 1955, which were not designated by appellant.

/s/ PERRY W. MORTON,
Assistant Attorney General.

/s/ ROGER P. MARQUIS,

/s/ JOHN C. HARRINGTON,
Attorneys, Department of Justice, Washington, D. C.

[Title of Court of Appeals and Cause.]

STATEMENT OF POINTS

To: The Honorable Judges of the United States Court of Appeals for the Ninth Circuit:

1. The District Court erred in making constant references and much criticism that appellant was representing herself, as is her constitutional right.

2. The District Court erred when the Court said, "the only truthful thing in your affidavit is that I refused to see you." The affidavit was made up strictly from the record and reflected a true summary of the Honorable Judge Yankwich's many prejudices. For Judge Yankwich to state that the affidavit was untruthful is a deep insult to the integrity of the appellant.

3. The District Court erred when he stated: "the acquisition of the property through condemnation by the government put an end to the action." The subject suit was filed some ten months previous to the condemnation suit filed by the government and had nothing to do with the condemnation suit, as such, nor could the government by filing an action put an end to an action previously filed only by virtue of merely filing an action such as is here claimed by the Honorable Judge Yankwich.

4. The District Court erred in saying that "you have sought, every time you filed a paper, an opportunity to present it to me in person." The appellant never once tried to present a paper that was to be filed other than those requiring his signature. In two cases she did go to get an ex parte matter cared for. The first time she did not realize that she was being rebuffed, the second time it was made clear to her that any paper she wished to present to the Judge must be sent to him via his clerk.

5. The District Court erred in making the broad statement that "lawyers know the ethics of the profession and litigants do not." This statement is so broad that it is a thin excuse to discriminate against the appellant. While the appellant is not an attorney no other judge has refused her the common courtesy that he accords to her opponents.

6. The District Court erred when he made an order resetting the hearing from April 4, 1955, to April 1, 1955. The case was duly to come on before the Honorable Judge Tolin on April 4th, but Chief Judge Yankwich did move up said case to be heard

by him. This in itself would seem innocent enough except a like incident had previously occurred in a case in trial before the Honorable Judge Beaumont, that Judge Yankwich sat himself on and criticized Judge Beaumont.

7. The District Court erred when he ordered that the affidavit should be stricken from the record on the ground that it was "scandalous." Said affidavit was a simple statement of unvarnished truth and was not scandalous or was it scurilous but in either case it would have still been admissible under the law.

8. The District Court erred in not allowing the appellant to explain the errors of the Court's thinking and deprived the appellant of her rights under the law, not having her day in Court before an impartial Judge.

9. The District Court erred when he said, "all that is here alleged is that I ruled against the litigant here in an injunction matter and a claim that I did not follow the law." The entire statement is not one of fact and is untrue.

10. The District Court erred in not disqualifying himself.

11. The District Court erred in granting Defendant's Motion to Dismiss.

Signed and dated this 30th day of November, 1955.

/s/ PANCHO BARNES,
Appellant in Propria Persona.

Affidavit of Service by Mail attached.

[Endorsed]: Filed December 2, 1955.